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U.S. Citizenship
and Immigration
Services

D2

FILE: EAC 02 130 51495 Office: VERMONT SERVICE CENTER Date: JAN 03 2005

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a consulting company, created to provide services to small businesses in accounting, sales, marketing, and financial planning. It also offers web page development, and sound and smart wiring for new homes, with all jobs performed through subcontractors. It seeks to hire the beneficiary as a drafter to support its residential automation, and smart or structural wiring projects, and to assist with the supervision of its subcontractors. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation. On appeal, the petitioner submits a brief.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the request for evidence; (3) the director's denial letter; and (4) Form I-290B, with attached brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is the determination of whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner states that it is seeking the beneficiary's services as a drafter and to assist with the supervision of its subcontractors. Evidence of the beneficiary's duties includes: the Form I-129, with a support letter from the petitioner; and the petitioner's September 28, 2002 response to the director's request for evidence. This evidence, however, provides little information to assist the AAO in the analysis required to determine whether the proffered position may be classified as a specialty occupation.

In his July 6, 2002 request for evidence, the director specifically noted that the petitioner, at the time of filing, had failed to provide an adequate description of the duties associated with its proffered position and requested a specific listing of the position's duties, including the percentage of time the beneficiary would spend at each. In its September 28, 2002 response to the director, the petitioner failed to provide such a description, offering only that the beneficiary would:

- Do drawings in AutoCAD, if needed, for different projects;
- Read plans and change specifications on plans provided for different jobs as necessary; and
- Supervise the work performed by subcontractors.

In that the petitioner's response also stated that it did not require the beneficiary to have a bachelor's degree to perform the duties of its position, the director determined that the petitioner had failed to establish that its position qualified as a specialty occupation.

On appeal, the petitioner's further explanation as to why it requires the beneficiary's services still does not constitute a description of the specific duties associated with its position. Instead, the petitioner describes its need for someone who can work in an office environment and generate electronic reports, can assist with the preparation of proposals by preparing CAD drawings, has knowledge regarding construction, low voltage work and structural wiring, and can report on the progress of its subcontractors at various construction sites.

Acknowledging that an H-1B visa cannot be issued because of the "bachelor's degree situation," the petitioner requests that the beneficiary, nevertheless, be allowed to work in the expansion of its business.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Based on the record before it, the AAO finds that the limited nature of the evidence provided by the petitioner does not allow for the analysis required by the first criterion. Based on what the petitioner has provided, it is not possible to identify the occupation under which the proffered position would fall and, therefore, impossible to determine whether a baccalaureate or higher degree, or its equivalent is normally the minimum requirement for entry into the particular position. Further, the AAO notes that the petitioner has not attempted to establish that a degree requirement is common to its industry or that its position is so complex or unique that it can be performed only by an individual with a degree, as required by 8 C.F.R. § 214.2(h)(4)(iii)(2). As a result, the petitioner has failed to meet its burden of proof under either the first or second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, however, the proffered position is newly created and the petitioner has no employment history that would establish it normally requires a degree or its equivalent for the proffered position. Instead, the petitioner, in response to the director's request for evidence, submitted an Internet job announcement for its proffered position in which it states that it is seeking a field supervisor. The job function in the announcement is listed as "Engineer - Civil, Web Development/Design." This announcement, which further confuses the limited position description provided by the petitioner, includes no degree requirement for the filling of the proffered position. When viewed in conjunction with the petitioner's statement to the director that its proffered position did not require a bachelor's degree, it leads the AAO to conclude that the petitioner is not attempting to

establish that it normally requires a degree or its equivalent for the position, as required by the third criterion. The AAO, therefore, turns to consideration of the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. However, as the petitioner has failed to provide an adequate description of the specific duties associated with its position, the AAO is precluded from any consideration as to whether the position might qualify as a specialty occupation under the fourth criterion.

For reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO notes that the petitioner is requesting that its situation be given special consideration because of what it characterizes as the misinformation provided to it regarding the qualifications for an H-1B visa. While the petitioner has stated that it understands that an H-1B visa cannot be approved because of the bachelor's degree requirement, it, nevertheless, seeks CIS' authorization to employ the beneficiary, citing the damage to be done to its business if that does not occur.

Despite the petitioner's desire to fill its proffered position with the beneficiary it has identified, the instant petition is not approvable, with both statute and regulation precluding the AAO from deciding otherwise. In the absence of an approved Form I-129 nonimmigrant visa petition, CIS cannot authorize the petitioner's employment of the beneficiary in this proceeding.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.